particularised in the statement of claim and the plaintiff is endeavouring by means of these interrogatories to find out whether the defendant has said the same thing or substantially the same thing to other persons, then an application to administer interrogatories for the purpose of ascertaining whether there are these other persons would be of a fishing character: *Barham* v. *Lord Huntingfield.*[4] But there is in this case something which though not of a sworn nature clearly claims that the appellant had published the libel complained of to other newspapers. It is in fact an inescapable inference from its own constitution and *raison d'etre*. *Russell* v. *Stubbs*[5] is authority for the proposition that if a plaintiff can satisfy the court that there has been in fact a publication to other persons whose names are unknown to the plaintiff, then the court may order interrogatories to be directed to the defendant as to the names of these other persons.

But in our view, there is a clear distinction between persons unknown to the respondent to whom the publication is alleged to have been made and "various persons in Malaysia and Singapore" some of whom had printed the alleged libel in their newspapers circulating in these countries. There is no averment that these various persons were unknown to the respondent and no reason is given why with ordinary diligence, such persons who are of a very restricted class could not be ascertained by the respondent for himself without recourse to the court. If his purpose is for the proper assessment of damages and it is necessary for this purpose, then he should, in the circumstances of this case, obtain the proof himself. If it be for the purpose of taking action against such publishers of the alleged libel, then it is much too late: section 6 Limitation Ordinance, 1953, but it is also to be observed that to date he has taken no action against the *Straits Times*.

For these reasons, we allowed the appeal with costs here and in the court below.

Appeal allowed.

Solicitors: *Battenberg & Talma; Thomas & Co.*

SIM SIOK ENG v. KONG MING BANK BERHAD

[F.C. (Chang Min Tat F.J., Salleh Abas F.J. & Charles Ho J.) September 5 & December 27, 1979]

[Kuching — Federal Court Civil Appeal No. 84 of 1979]

Limitation — Claim on overdraft by bank — No demand necessary to start time from running — Claim statute barred Limitation Ordinance, Schedule arts. 40 and 101.

Banking — Overdraft by bank — Secured by charge on lands — Overdraft exceeding maximum under charge — Claim by bank on overdraft — Limitation — Limitation Ordinance, Schedule, arts. 40 and 101.

In this case the respondent bank had given an unsecured overdraft accommodation to the appellants. Subsequently in order to increase the overdraft the appellants charged his lands to the bank to secure the repayment on demand of the overdraft up to a maximum of $90,000. The overdraft was allowed to exceed $90,000 and the account lay dormant from 1974. In 1978 the bank brought an action for the repayment of the whole of the sum owing on the overdraft. The defence was limitation as under Article 40 of the schedule to the Limitation Ordinance, the period of limitation for money lent on an agreement that it should be payable on demand was three years from the date of the loan. It was argued by the respondent bank that the "on demand" provision of the charge made demand an absolute necessity for the claim on the overdraft and therefore time did not run against the Bank until a demand was made and repayment refused. The learned trial judge held that the demand made by the respondent bank just before taking out the suit gave it a cause of action. The appellant appealed.

Held: the respondent-bank could not in this case claim that the simple contract debt of an overdraft was merged into the charge and as the claim in this case was on the overdraft, the claim was statute barred, as in the absence of any stipulation for a demand for repayment on the overdraft, time ran from the date of the loan or from the last payment of interest or part payment of capital, if paid before the end of the prescribed period, which was three years.

Cases referred to:-

(1) *Bian Chiang Bank Berhad* v. *Kwong Hing Cheong* [1978] 2 M.L.J. 193.

(2) *Joachimson* v. *Swiss Bank Corporation* [1921] 2 K.B. 110.

(3) *Parr's Banking Co.* v. *Yates* [1898] 2 Q.B. 460.

(4) *Ram Chunder Ghosaul* v. *Juggutmonmohini Dabee* (1878) I.L.R. 4 Cal. 283.

(5) *Norton* v. *Ellam* 2 M. & W. 461; 150 E.R. 839.

(6) *Ramdin* v. *Kalka Pershad* (1884-1885) L.R. 12 I.A. 12.

(7) *Barclays Bank Ltd.* v. *Beck & Anor.* [1952] 1 All E.R. 549.

(8) *Stamps Commissioner* v. *Hope* [1891] A.C. 476.

FEDERAL COURT.

Foo Kim Jiong for the appellant.

Chew Pok Oi for the respondents.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): We allowed the appeal at the hearing and now give our reasons.

The appellant, while a customer of the respondent Bank, was given an unsecured overdraft accommodation. In the language of the banking world, it was a clean overdraft. Perhaps because of this, it was for a modest amount of $3,000. In August, 1970, the appellant required substantially greater facilities and by creating a charge on lands belonging to him to secure the repayment on demand of "the fluctuating overdraft or otherwise up to a maximum extent of $90,000," managed to obtain an increase of the limit of the overdraft to this maximum.

All would have been well and the Bank would have been able to rely on the period of twelve years which it had for the repayment of the balance standing in this overdraft account by foreclosing of the charge without being confronted with the defence of limitation if the overdraft had remained at the level of $90,000, since Article 101 of the Schedule to the Limitation Ordinance (Cap. 49, Sarawak) provides:

"101. To enforce payment of money charged upon immovable property... the limitation period is 12 years when the money sued for becomes due."

But, for one reason or another, the principal sum due on November 4, 1974 had been allowed to mount up to $194,959.12. It would have been considerably more, by another third, but for the repayment of a sum of $65,000 made by the appellant on a partial discharge of the security charged to the Bank.

Thereafter the account lay dormant. The appellant did not make a single payment and the only

activity since was the regular debiting of the account at the end of each month with the interest that had accrued in that month. The Bank was therefore unable to rely on the provisions of section 20(1) of the Limitation Ordinance for a renewal of the period by any subsequent payment to run from the last payment.

Nevertheless, when it decided to take legal action in April 1978 to recover repayment, it sought the repayment of the whole of the sum owing on the overdraft. By an amendment applied for at the hearing which the judge allowed over the objections of the appellant, the Bank claimed interest accrued on the principal sum owing to November 4, 1974 at $128,396.61 and further interest from that date to March 31, 1978 at $97,819.97. The Bank's claim was therefore for $421,173.70.

The defence was terse and raised directly the defence that the claim on the overdraft was statute-barred. It was the only defence. The article relied on was Article 40 to the Schedule to the Limitation Ordinance. It reads

"40. For money lent under an agreement that it shall be payable on demand... the limitation period is 3 years when the loan was made."

This court has in *Bian Chiang Bank Berhad* v. *Kwong Hing Cheong*[1] held expressly that a payment by a debtor revived the period of time and impliedly that in the case of an overdraft, no demand for payment was necessary to start time from running. In the absence of any stipulation for a demand for repayment on the overdraft, time ran from the date of the loan or from the date of the last payment of interest or part payment of capital, if paid before the expiration of the prescribed period, which was three years: Section 20(1) of the Limitation Ordinance. On the authority of that case, judgment should have been given for the appellant where similarly there was no requirement for the overdraft to be repaid only on demand and the claim of the Bank on the overdraft dismissed, since more than 3 years had elapsed between the last payment of $65,000 on November 1974 which was clearly towards principal and April 1978 when the writ was taken out.

However, the Bank brought in aid of its contrary contention the existence of the charge which was not relied on in the pleadings or even referred to. It contended, successfully before the judge, that the "on demand" provision of the charge made a demand an absolute necessity for this claim on the overdraft and time did not therefore run against the Bank until a demand was made and repayment had been refused. The judge then held that the demand made by the Bank on April 4, 1978 just before taking out the writ gave it a cause for action.

The judge relied on the case of *Joachimson* v. *Swiss Bank Corporation*,[2] a case of money owed by the Bank to the customer. He referred to the headnote which reads:

"Where money is standing to the credit of a customer on current account with a banker, in the absence of a special agreement a demand by the customer is a necessary ingredient in the cause of action against the banker for money lent."

and found in it the authority for distinguishing the appellant's case from *Bian Chiang Bank Berhad* v. *Kwong Hing Cheong, supra.*

It is to be realised however that the *Swiss Bank* case was not directly under the Statute of Limitations and turned entirely on the question whether demand is necessary to create a cause of action against a bank on a current account. The Court of Appeal held that the necessity for demand in the case of a current account was not established by authority but that it must be implied from the relation of banker and customer that demand is necessary. This case is therefore to be distinguished from a case such as this of a customer owing money to the bank on an overdraft. It is settled that a bank cannot recover a dormant overdraft after the period of limitation from the last advance had expired: *Parr's Banking Co.* v. *Yates.*[3]

However, in the *Swiss Bank* case, Atkin L.J. said, generally:

"The question appears to me to be in every case, did the parties in fact intend to make the demand a term of the contract? If they did, effect will be given to that contract, whether it is a direct promise to pay or a collateral promise, though in seeking to ascertain their intention, the nature of the demand may be material."

Thus it is a question of ascertaining the intention of the parties.

For ourselves in the case of an overdraft on a current account, we agree, with respect, with what Garth C.J. said in *Ram Chunder Ghosaul* v. *Juggutmonmohini Dabee*[4] at page 294 that

"Where a man promises to pay a sum of money, etc. on demand, which it is his duty to pay whether a demand be made or not, then the money becomes payable at once, and no demand is necessary before suing him for it: as for instance, in the case of money lent, and money due for goods sold or for work done."

The words "on demand" do not by themselves make a demand a term of the contract.

In *Norton* v. *Ellam*,[5] where the question was as to when the Statute of Limitations began to run on a promissory note payable with interest on demand, Parke B. said:

"It is the same as the case of money lent payable upon request with interest where no demand is necessary before bringing the action. There is no obligation in law to give any notice at all.... It is quite clear that a promissory note payable on demand is a present debt and is payable without demand, and the statute begins to run from the date of it."

So in the case of an overdraft on a current account unless the parties stipulate clearly and other than by merely using the words "on demand", that the amount shall be payable on demand being made, time runs from the last advance by the bank to the customer or from the last payment of interest or capital or both by the customer. And it is to be observed that in the overdraft account in the instant case, there is no use of the words "on demand" and there is also no evidence or contention of any stipulation in the overdraft that a demand is an agreed condition before the debt becomes payable, and that this was a claim on the overdraft account.

The contention of the Bank in relying on the words "on demand" in the charge is that the period of twelve years in Article 101 applied to every remedy which the charge carried with it and gave twelve years for the personal remedy against the chargor or as well as against the charged property. This contention

was however specifically rejected by their Lordships of the Privy Council in *Ramdin* v. *Kalka Pershad.*[6] In that action, the lender sought to enforce a mortgage and prayed that the principal and interest might be enforced against the mortgaged property and also by rendering the person of the borrower and his other property liable on the ground that the mortgagor pledged not only fixed immoveable property but also his personal bond. Their Lordships held that since ten years had elapsed, the mortgagee's remedy against the person of the mortgagor was barred but his right remained to enforce his demand against the mortgaged property.

Facts identical to those in the case under appeal existed in *Barclays Bank Ltd.* v. *Beck & Anor.*[7] The issue there was not limitation but was merger of the causes of action. There the defendants had similarly executed a charge to secure an increased overdraft, and they claimed that after they had paid off the charge, they were no longer liable for the excess of the overdraft over the agreed amount of the charge. They contended that the simple contract debt had been merged in the charge. Their contention was rejected, just as the contention in this case made as a corollary should be. Because the claim on the charge was not barred, it did not mean that the claim on a simple debt made more than three years after it had become due, was similarly not barred.

In his judgment in that case, Denning L.J. said at pages 552-3:

"When security is given for payment of amounts due or to become due on a running account, the doctrine of merger, if it applies at all, would at the most only apply to the indebtedness which existed at the date when the convenant was taken and the charge given. Future debts do not merge; they take their colour from the circumstances in which they arise. They are then either specialty debts or simple contract debts, and, as they start, so they go on... a future debt on a running account is a debt created by parol and it remains a simple contract debt even though the customer has previously given a charge to secure it.... The future debt on running account is not created under the deed. It may be that it would never have been created but for the deed, but that is a different thing. It only means that the deed is collateral security for its repayment.... Where this collateral security was discharged and handed over, the indebtedness on simple contract remains except in so far as it had been satisfied by payment."

We would add to the last sentence, or except in so far as the defence of limitation succeeds.

Both Denning L.J. and Somervell L.J. relied on the Privy Council *dictum* in *Stamps Commissioner* v. *Hope*[8] that

"The reported language of the court in some places indeed seems to imply a larger and broader meaning; but, if that is to be understood as importing that a merger of a simple contract debt in a debt of a higher nature is effected by law, merely by the existence of an identical covenant and notwithstanding the plain intention of the parties to the contrary, that is a proposition which their Lordships would hesitate to assent to."

In our view therefore, there is sufficient authority to hold that the Bank, in its own turn, cannot claim that the simple contract debt of an overdraft is merged into the charge and so far as limitation is concerned, covered by Article 101 and not by Article 40.

Counsel for the respondents referred to two more Articles in the Schedule to the Limitation Ordinance. He did not rely on them in the court below. He now said that the defence of limitation could be defeated by the provisions of Article 94 or 97. Both provide for a period of 6 years and if time ran from November 4, 1974, then the Bank's action would not be statute-barred. Article 94 refers to an action for compensation for the breach of a contract in writing and Article 97 to a suit for which no period of limitation is provided elsewhere in the Schedule. The short answers are: the Bank's action is not for compensation for the breach of a contract in writing and a period of limitation is provided in Article 40 for a claim for money lent.

The appeal was for these reasons allowed with costs, both here and in the court below. It should be clear however that nothing in this judgment decides that the charge is barred by limitation.

Appeal allowed.

Solicitors: *Ee & Lim; Chan, Jugah, Wan Ullok & Co.*

SEBAYA SDN. BHD. v. SYARIKAT BEKERJASAMA LADANG KELAPA SAWIT PEGAWAI-PEGAWAI NEGERI PAHANG BERHAD

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat & Ibrahim Manan F.JJ.) October 8-10 & December 27, 1979]

[Kuala Lumpur — Federal Court Civil Appeal No. 90 of 1978]

Practice and Procedure — Action by Co-operative Society against managers of their oil palm plantation — Action for dismissal of managers — Application for interlocutory order for payment into court of proceeds of sale of oil palm — Order for payment into court made by court.

In this case the respondents, a co-operative society, which owned an oil-palm plantation had appointed the appellants as managers but had not got a cent from it. They served notice of dismissal and took action against the appellants. They then asked for an interlocutory order for the payment into court of the proceeds of the sale of oil palm fruits harvested from the land. The learned trial judge ordered the appellants to pay $1,000,000 into court within thirty days and the sum of $50,000 on the 1st day of each month commencing from July 1, 1978 and that upon failure to pay the sum of $1,000,000 into court as ordered they were to vacate the estate. The appellants appealed and applied for stay. Stay was allowed for the payment of $1,000,000 but not of the $50,000 monthly. The appeal was then heard by the Federal Court.

Held: on the evidence in this case the sum likely to be due to the respondents was sufficiently ascertained and the High Court had jurisdiction to make the order and had exercised its jurisdiction properly in making the order.

Cases referred to:-

(1) *London Syndicate* v. *Lord* 8 Ch. D. 84.

(2) *Wanklyn* v. *Wilson* (1887) 35 Ch. D. 180.

FEDERAL COURT.

Raja Abdul Aziz bin Raja Addruse for the appellant.

Chin Yew Meng for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): A planted and matured oil palm plantation of some 3,000 acres in production (though not all of it) from October 1974 and not a cent from it.